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U.S. Citizenship
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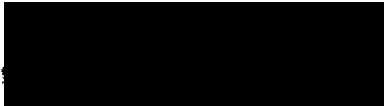
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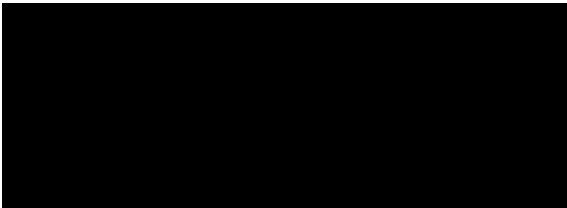
FILE: WAC 03 101 53442 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides home care for the elderly. It seeks to employ the beneficiary as a residential care health counselor. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional and previously submitted evidence.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a residential care health counselor. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail planning daily health care and social activities; advising about hygiene including diet planning; reviewing personal records, especially medication and treatment plans from medical personnel; conferring with medical and nursing personnel to ensure proper medication and treatment; and evaluating residents' daily health status by interacting with them. The petitioner stated that a candidate for the proffered position must possess a baccalaureate degree in nursing or a related health care field with course work in nursing practice and nutrition.

The director determined that the proffered position was not a specialty occupation. The director stated that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals that the proffered position resembles a licensed vocational nurse, an occupation that does not require a bachelor's degree. Further, the director stated that the proposed duties and stated level of responsibility did not indicate a complexity or authority that is beyond what is normally encountered in the field. Although the petitioner claimed that the proffered position resembles a counselor, the director determined that the *Handbook* reveals that the beneficiary does not have the proper degree to be a counselor.

On appeal, counsel asserts that the proffered position is a specialty occupation under 8 C.F.R. §§ 214.2(h)(4)(iii)(A). Counsel states that the regulations governing the petitioner's facility do not authorize extensive medical services; thus, counsel contends that the beneficiary's duties are not performed by a licensed vocational nurse because the proposed duties do not focus on medical services. Counsel states that the beneficiary will counsel elderly residents about general health, and that a bachelor's degree in counseling is inadequate for the proposed position; it does not provide knowledge and training about health care. Counsel claims that the proffered position's duties more closely resembles a counselor based on the duties to assess and evaluate residents, and plan and advise on their well-being. Counsel claims that the beneficiary is qualified for the proposed position based on her education and experience, and further, that the proposed position is a specialty occupation since the academic fields of nursing, counseling, social work, and public health share the core component of public/community healthcare counseling. Referring to the *Handbook*, counsel states that it explains "formal education is necessary to gain employment as a counselor," and about "half of all counselors have a master's degree." Counsel analogizes the proffered position to the *Occupational Information Network's (O*Net)* description of a mental health counselor. According to counsel, the proffered position is unique and complex since it has interdisciplinary duties similar to a counselor/social worker and a public health technician, and refers to a specific AAO decision to contend that neither the Act nor case law precludes occupations with interdisciplinary educational prerequisites from qualifying as specialty occupations. Pointing to submitted job advertisements, counsel claims that although the advertised jobs are not combined/interdisciplinary or complex like the proffered position, they still require at least a baccalaureate degree. Counsel states that the proffered position is newly created.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

Counsel asserts that the proffered position is a specialty occupation because of information in the *O*Net*. The *O*Net* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The DOL has replaced the *Dictionary of Occupational Titles (DOT)* with the *O*Net*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because of information in the *O*Net*.

Counsel contends that the proffered position is similar to a mental health counselor. The *Handbook* discloses that the duties of the proffered position do not rise to the level of a mental health counselor. According to the *Handbook*, a mental health counselor works with:

[I]ndividuals, families, and groups to address and treat mental and emotional disorders and to promote optimum mental health. They are trained in a variety of therapeutic techniques used to address a wide range of issues, including depression, addiction and substance abuse, suicidal impulses, stress management, problems with self-esteem, issues associated with aging, job and career concerns, educational decisions, issues related to mental and emotional health, and family, parenting, and marital or other relationship problems. Mental health counselors often work closely with other mental health specialists, such as psychiatrists, psychologists, clinical social workers, psychiatric nurses, and school counselors. . . .

The petitioner does not describe the beneficiary as addressing any of the issues outlined in the above passage. Instead, the beneficiary appears to observe the physical condition of patients such as evaluating their health status, their diet, and their daily health care. Nor does the petitioner describe the beneficiary as working closely with mental health specialists, such as psychiatrists, psychologists, clinical social workers, or psychiatric nurses. Equally important, the *Handbook* reveals that counselors must hold proper licensure, which is something that the petitioner does not require.

Based on the evidence in the record, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, residential care health counselor.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel refers to job advertisements, and states that the job titles "residential counselors," "clinical social worker," and "F/T Youth Counselor" in the advertisements require at least a baccalaureate degree.

This evidence is not persuasive for several reasons. Many of the organizations in the postings are dissimilar from the petitioner; their degree requirement is often different from the petitioner; and either no duties are described in the advertisements or the duties are not parallel to the proffered position. Penny Lane Center is a residential group home for adolescents; St. Mary's Medical Center seeks a candidate with a master's degree; licensed clinicians are sought in several advertisements; duties of several jobs entail working with SED children or adolescents; Shields for Families, Inc. required a master's degree and a license or license eligibility and its job entails providing therapy to children and adolescents; and the Children's Bureau seeks counselors to work with children and their families. Given the significant differences between the proffered position and the advertisements, the petitioner fails to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* reveals that the proffered position is not analogous to a mental health counselor.

As stated by the petitioner, the proffered position is newly created. Therefore, the petitioner cannot establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As discussed, the *Handbook* discloses that the duties of the proffered position do not rise to the level of a mental health counselor. Furthermore, the submitted regulations from the California-DSS-Manual-CCL are not relevant because they do not describe any counseling responsibilities. Therefore, the petitioner fails to establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.